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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION THREE

REBECCA A. RICKLEY et al.,

Plaintiffs and Appellants,

v.

MARVIN GOODFRIEND et al.,

Defendants and Respondents.

B202717

(Los Angeles County Super. Ct. No. SC088953)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Law Offices of Natasha Roit and Natasha Roit; Edward J. Horowitz for Plaintiffs and Appellants.

Chapman, Glucksman, Dean, Roeb & Barger, Randall J. Dean and Mark E. DiMaria for Defendants and Respondents.

I.

INTRODUCTION

Plaintiffs and appellants Natasha Roit and Rebecca A. Rickley (collectively appellants) appeal from a summary judgment entered in favor of defendants and respondents Marvin Goodfriend, Tina Fashbender Goodfriend, and the Goodfriend Family Trust.

We hold, as did *Gagan v. Gouyd* (1999) 73 Cal.App.4th 835,¹ that the conveyance of property to a revocable trust by a grantor who is a trustor and beneficiary of that trust cannot constitute a fraudulent transfer under the Uniform Fraudulent Transfer Act, Civil Code section 3439 (the UFTA).

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The initial facts*.

1. The Goodfriends' trust, prior proceeding, and the prior appeal.

Respondents Marvin Goodfriend and Tina Fashbender Goodfriend (the Goodfriends) were husband and wife. He was a certified public accountant and she was a certified financial planner. The Goodfriends created a family trust on July 2, 1997 (the Family Trust), in which they were designated as the sole trustors and the current trustees. During their lifetime, the Goodfriends were the beneficiaries of the Family Trust. According to the Family Trust's introductory recitals, if any separate property was added to the Family Trust, that property and its proceeds retained its character as that trustor's separate property. The Family Trust was revocable while both Mr. Goodfriend and Mrs. Goodfriend were alive.²

Gagan v. Gouyd, supra, 73 Cal.App.4th 835, overruled on other grounds in Mejia v. Reed, supra, 31 Cal.4th 657, 661, 669, footnote 2.

Upon the death of either Mr. or Mrs. Goodfriend, three trusts were established: a revocable survivor's trust, an irrevocable marital trust, and an irrevocable bypass trust. The Goodfriends and their family members were beneficiaries of the various sub-trusts.

The Goodfriends lived next door to appellants in Malibu, California. The Goodfriends' Malibu property was owned by Mr. Goodfriend as his separate property.

On May 17, 2004, appellants filed a complaint against the Goodfriends alleging, in part, that the Goodfriends created a nuisance by putting construction debris onto their property. (Los Angeles Superior Court Case No. SC 081696.)³

On August 19, 2005, Mr. Goodfriend executed a deed conveying title of his Malibu property to the Family Trust. The conveyance was made with *out* any consideration and was *not* recorded.

On February 23, 2006, the superior court found for appellants on their causes of action for trespass, negligence per se, nuisance, and violation of CC&R's. The court entered judgment against Mr. Goodfriend, only, and awarded appellants injunctive relief directing, among other actions, remediation and the removal of debris. Mr. Goodfriend was awarded \$6,260 on his cross-complaint for trespass.

Four days later, on February 27, 2006, Mr. Goodfriend recorded the 2005 deed conveying his separate property to the Family Trust.

On June 15, 2006, the trial court entered an order awarding appellants certain costs of suit. Appellants appealed from that portion of the June 15, 2006, order that had denied their request for approximately \$31,000 in expert fees as additional costs.

On January 9, 2008, Division Seven of this District, in *Rickley, et al. v. Goodfriend, et al.* (B192939) reversed that portion of the June 15, 2006, order that had denied appellants' request for additional costs and remanded the matter to the trial court for further proceedings to determine if Mr. Goodfriend had obtained a

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Shahriar Yazdani was also a party to Los Angeles Superior Court Case No. SC 081696. Yazdani is not a party to this appeal.

more favorable judgment than appellants' offer made pursuant to Code of Civil Procedure section 998.

2. The present proceedings.

On March 14, 2006, less than a month after Mr. Goodfriend recorded the deed, appellants filed this lawsuit against Mr. Goodfriend, Mrs. Goodfriend, and the Family Trust (collectively respondents). Appellants alleged that the conveyance by Mr. Goodfriend of his Malibu property to the Family Trust was a fraudulent transfer actionable pursuant to the UFTA. Appellants alleged in the complaint, and in the subsequently filed first amended complaint, that the conveyance was done with the intent to "hinder, delay and/or defraud [appellants] as creditors [in Los Angeles Superior Court Case No. SC 081696]."

After answering, respondents filed a motion for summary judgment arguing that a conveyance of property to a revocable trust by a grantor who is a trustor and beneficiary of that trust does not and cannot constitute a fraudulent transfer under the UFTA, as a matter of law. On June 25, 2007, the trial court granted the motion. The trial court held that the deed transferring the real property to the Family Trust during the lifetime of the trustors did not constitute a fraudulent transfer.

Appellants timely appealed from the subsequently entered judgment. We affirm.

III.

DISCUSSION

A. Standard of review.

"Summary judgment is properly granted where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)" (*Estate of Molino* (2008) 165 Cal.App.4th 913, 921; see also, *Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538, 1544.) As the moving party, a "defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or

more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) "We review the court's decision granting a summary judgment de novo." (*Estate of Molino, supra*, at p. 921; *Garabet v. Superior Court, supra*, at p. 1544.) We affirm the trial court's ruling granting summary judgment if the ruling is correct on any theory. (*Espericuenta v. Shewry* (2008) 164 Cal.App.4th 615, 622.)

B. The conveyance of the property to the Family Trust cannot be a fraudulent transfer.

This appeal raises a purely legal issue: Did the conveyance by Mr. Goodfriend of his separate property into the revocable Family Trust constitute a "transfer" pursuant to the UFTA? The answer is "no."⁴

"The Uniform Fraudulent Transfer Act (UFTA), codified in Civil Code section 3439 et seq., 'permits defrauded creditors to reach property in the hands of a transferee.' (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663.)" (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829.) "'A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' [Citation.]" (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 648.)

"A transfer under the UFTA is defined as 'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset . . . , and includes payment of money, release, lease, and creation of a lien or other encumbrance.' (Civ. Code, § 3439.01, subd. (i).) 'A transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay, or defraud any creditor, or (2) without receiving reasonably

Because the resolution of this question turns on uncontested facts, we need not address a number of factual issues that are in conflict, such as whether the conveyance of the property was done with the intent to defraud.

equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due. [Citations.]" (*Kirkeby v. Superior Court, supra, 33* Cal.4th at p. 648, citing among others, Civ. Code, § 3439.04, subd. (a)⁵; Civ. Code, § 3439.05; see also, *Mejia v. Reed, supra, 31* Cal.4th at p. 664; *Filip v. Bucurenciu, supra, 129* Cal.App.4th at p. 829.)

The court has a number of remedies to enforce a successful UFTA action, including attachments, injunctions, the appointment of receivers, and recordation of a lis pendens. (*Kirkeby v. Superior Court, supra,* 33 Cal.4th at pp. 651-652.) It "may result in the voiding of a transfer of title of specific real property." (*Id.* at p. 649.)

The undisputed evidence is that Mr. Goodfriend unconditionally conveyed his property into a revocable trust at the time both he and his wife were alive and at a time when they were beneficiaries of the Family Trust. This conveyance did not insulate it from Mr. Goodfriend's creditors. Rather, the property was conveyed into a revocable inter vivos trust which is a probate avoidance vehicle, but not one that prevents creditors of settlors to reach trust property. (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633.) Pursuant to Probate Code section

Civil Code section 3439.04, subdivision (a) provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor. [¶] (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: [¶] (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. [¶] (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due."

18200, property in a revocable trust is subject to creditors' claims to the extent of the debtor's power of revocation. Probate Code section 18200 reads: "If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor." Thus, the conveyance by Mr. Goodfriend of his property to the Family Trust did not constitute a "transfer" as the conveyance did not dispose of or part with his asset. Rather, Mr. Goodfriend's creditors (including appellants) had access to the property.

This conclusion is consistent with Gagan v. Gouyd, supra, 73 Cal.App.4th 835. In Gagan, James Gagan obtained a money judgment against Victor Sharar and James E. Gouyd. (Gagan, supra, at p. 838.) Victor Sharar, James Gouyd, and their respective wives made several property conveyances. Among other transactions, Gouyd and his wife Constance conveyed community property into a revocable trust. The appellate court first held that the conveyance of the Gouyd property did not violate the UFTA because the conveyance was not a "transfer" within the meaning of Civil Code section 3439.01, subdivision (i). The appellate court explained as follows: "the transfer of the property to the . . . Trust was not a fraudulent transfer because Constance and James [Gouyd] remained the beneficiaries. [T]he transfer by James and Constance did not result in 'disposing of or parting with an asset or an interest in an asset.' The property remained available to creditors. There is no evidence in this case that the transfer by James and Constance to a revocable trust of which they were the beneficiaries rendered the property unavailable to the creditors. Property in a revocable trust is subject to creditor claims to the extent of the debtor's power of revocation. (Prob. Code, § 18200.) Hence, the trial court erred in finding that transfer of the real property to the trust was a fraudulent conveyance." (Gagan, supra, at p. 842.)

In *Gagan v. Gouyd, supra*, 73 Cal.App.4th 835, the appellate court also addressed community property conveyed by Victor Sharar and his wife Mary Lois into the VMS 1992 Trust. (*Id.* at p. 839.) Here again, the appellate court held that

there was no fraudulent conveyance: "We have some difficulty in understanding why the case against Victor and Mary Lois was couched in terms of fraudulent conveyance. All of the property they held, whether in a revocable trust, or in the names of Victor or Mary Lois alone, was community property and therefore available to satisfy Gagan's judgment. Victor's transfer of property to Mary Lois therefore was not a 'transfer' within the meaning of the Uniform Fraudulent Transfer Act (§ 3439.01, subd. (i)) because it did not dispose of or part with an asset or an interest in an asset [citation] with the 'intent to hinder, delay, or defraud' Gagan. ([Civ. Code,] § 3439.04, subd. (a).) The Sharars retained their assets and all were available to satisfy the judgment of Gagan." (*Gagan v. Gouyd, supra,* at p. 844; see also Prob. Code, § 19001.)⁶

Contrary to appellants' suggestion, *Gagan*'s decision did not rest on the fact that the property transferred was community property. Rather, the decision was premised upon the fact that the conveyances did not preclude access to the properties by creditors. Similarly, here, Mr. Goodfriend conveyed his separate property into a revocable trust in which he and Mrs. Goodfriend were the beneficiaries. Mr. Goodfriend's separate property retained its character when it was transferred into the Family Trust and remained accessible by his creditors. Thus, there was no "transfer" actionable under the UFTA.

Appellants suggest that *Gagan v. Gouyd, supra*, 73 Cal.App.4th 835 and its reasoning can no longer be used as authority because *Gagan v. Gouyd*, was overruled by *Mejia v. Reed, supra*, 31 Cal.4th 657. (See fn. 1.) However, *Mejia* held that *Gagan* erred when it additionally held that the provisions of the UFTA did not apply to marital settlement agreements. (*Id.* at pp. 661, 669, fn. 2.) *Mejia*

Probate Code section 19001, subdivision (a) reads: "Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses."

did not address *Gagan v. Gouyd*'s separate holding with regard to the conveyance of property to a revocable trust. (Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2008) ¶ 3:319.5, p. 3-97 ["A property transfer to a revocable trust by a transferor who is also one of the trust's beneficiaries is *not* a fraudulent transfer. [See *Gagan v. Gouyd*[, *supra*,] 73 [Cal.App.4th at p. 842] (disapproved on other grounds in *Mejia v. Reed*[, *supra*,] 31 [Cal.4th at p. 669, fn. 2 . . .].)"]; 8 Witkin, Cal. Procedure (8th ed. 2008) Enforcement of Judgment, § 489, pp. 528-529 [*Gagan v. Gouyd*[, *supra*, at p.] 842 ["transfer of property by judgment debtor and wife to revocable trust was not fraudulent transfer within meaning of [Civil Code section] 3439.01(i), because they remained beneficiaries and thus transfer did not result in 'disposing of or parting with an asset or an interest in an asset' "].)

The trial court correctly granted summary judgment to respondents because appellants cannot state a cause of action under the UFTA.

IV.

DISPOSITION

The judgment is affirmed. Appellants Natasha Roit and Rebecca A. Rickley are to pay all costs on appeal.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.